circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove." Therefore I venture to remark that in all cases of this class the Court will seek to be certain, by vigilant security, of the true nature of such a transaction, because one can readily see that the close relationship between husband and wife may, unless explained, give rise to the not unnatural inference that the husband was truly the party intervening in the case, and that not without benefit to himself. Subjecting everything that was done in this case to that scrutiny I am unable to imagine any case which could well be stronger for sustaining the transaction which the pursuer seeks to challenge.

LORD CULLEN—I concur.

The Court adhered.

Counsel for the Reclaimer—Constable, K.C.—C. M. Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondents—A. O. M. Mackenzie, K.C.—D. P. Fleming. Agents—Webster, Will, & Co., W.S.

Thursday, January 28.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

BANNERMAN'S TRUSTEES *v.* BRODIE AND OTHERS.

Succession—Trust—Faculties and Powers—Validity—Uncertainty—Direction to Liferenter to Dispose of Fee by Mortis causa Deed.

A testator by trust-disposition and settlement gave to the survivor of his children the liferent of a portion of his estate, with power to dispose of half of the same by *mortis causa* deed "in favour either of religious or charitable institutions, one or more, conducted according to Protestant principles, or of any person or persons whom such survivor may appoint, or partly in favour of such institution or institutions and partly in favour of such person or persons." The liferenter by deed of directions bequeathed one-half of the fee absolutely to his wife. *Held* (*diss.* Lord Johnston) that the direction of the testator was not void from uncertainty, and had been validly carried out by the liferenter; *per* the Lord President on the ground that the objects to be benefited had been sufficiently specified; *per* Lord Skerrington on the ground that the liferenter having both a fiduciary and a proprietary power of disposal had validly exercised the latter.

Observations per Lord Skerrington on the relation of fiduciary and proprietary powers of disposal.

Expenses—Multiplepoinding—Action not Timeously Raised—Attempt to Upset Trust Administration—Liability of Unsuccessful Claimants.

A trust-disposition which came into effect in 1879 conferred upon a liferenter a power of disposal *mortis causa* of the liferented fund. He exercised the power by a deed of directions, and died in 1903. In February 1913 a multiplepoinding was raised by a beneficiary of the trust who had been paid his interest, the trustees being nominal raisers, questioning the validity of the power. He was successful in maintaining the competency of the action, but unsuccessful in his claim. The Lord Ordinary found the real raiser entitled out of the fund *in medio* to the expense of raising the action and bringing it into Court, those challenging the competency, including the nominal raisers, liable jointly and severally for the expense thereby caused, and the unsuccessful claimants liable jointly and severally for the expense of the competition. The Court, in refusing a reclaiming note, on the ground that the action had not been raised at the beginning of the trust with the view of helping the trust administration, but was directed against the trust administration, *adhered* and found the real raiser liable in the further expenses of the cause.

On February 14, 1913, Mrs Mary Woods or Bannerman, 1 Crown Circus, Glasgow, widow of the late Robert Bannerman, 16 Blythswood Square, Glasgow, and others, the testamentary trustees of the late Walter Bannerman, 13 Jane Street, Blythswood Square, Glasgow, *pursuers and nominal raisers and respondents*, brought an action of multiplepoinding in the Court of Session against Mrs Jessie Bannerman or Brodie, wife of and residing with William Brodie, 23a Old Ballygunge, Calcutta, India, and the said William Brodie as her curator and administrator-in-law; Mrs Isobel M'Alpine Davidson or Bannerman, 41 Keir Street, Pollokshields, Glasgow, the executrix of the late Walter Bannerman *tertius*, sometime residing at Pollock House, Kemishead, near Glasgow; Stanley Cyril Forster Bannerman, 1 Crown Circus, Glasgow; Mrs Mary Ramsay or Bannerman, widow, 25 Montgomerie Drive, Kelvinside, Glasgow; and Robert Bannerman junior, 26 Port Street, Stirling, *defenders*, the said Robert Bannerman junior being also *real raiser and reclaimer*. The questions upon which the case is reported are whether a bequest of a power in Walter Bannerman's trust-disposition and settlement was valid, and incidentally the question of expenses.

The *facts* in the case appear from the opinion (*infra*) of the Lord Ordinary (ORMIDALE), who, on 20th January 1914, pronounced the following interlocutor:—". . . Ranks and prefers the claimants (*a*) Mrs Mary Woods or Bannerman and others (Walter Bannerman's trustees), and (*b*) Mrs Jessie Bannerman or Brodie, in terms of their claim: Ranks and prefers the claimant Mrs Mary Ramsay or Bannerman in terms of her claim: Repels the claim

of Robert Bannerman junior, the claim for Mrs Isabel M'Alpine Davidson or Bannerman (executrix of Walter Bannerman *tertius*), and the claim of Stanley Cyril Forster Bannerman, and decerns: Finds the real raiser entitled to the expenses of raising and bringing this action into Court out of the fund *in medio*: Finds the real raiser entitled to the expenses occasioned by the objections raised to the competency of the action as against (1) the nominal raisers Walter Bannerman's trustees and the defender Mrs Jessie Bannerman or Brodie, and (2) the defender Mrs Mary Ramsay or Bannerman, jointly and severally: Finds the said claimants Robert Bannerman junior, Mrs Isabel M'Alpine Davidson or Bannerman (as executrix foresaid), and Stanley Cyril Forster Bannerman liable jointly and severally in the expenses of the competition to the said successful claimants, viz., (1) (*a*) Mrs Mary Woods or Bannerman and others (Walter Bannerman's trustees), and (*b*) Mrs Jessie Bannerman or Brodie, and (2) Mrs Mary Ramsay or Bannerman."

Note.—"Walter Bannerman *primus* died on 7th August 1879, leaving a trust-disposition and settlement dated 4th May 1877. The residue of his estate as realised amounted to about £80,000.

"He was survived by one daughter, Jessie, and two sons, Robert Bannerman senior and Walter Bannerman *secundus*. Jessie died in 1896 unmarried. Robert Bannerman senior died in 1902, leaving four children—[Mrs Jessie Bannerman or Brodie, Walter Bannerman *tertius*, now deceased, Robert Bannerman junior, and Stanley Cyril Forster Bannerman]. Walter *secundus* died, leaving a widow [Mrs Mary Ramsay or Bannerman], but without issue, in 1903.

"Walter *secundus* was thus the survivor of the three children of Walter *primus*.

"By the *trust-disposition and settlement* of Walter *primus* the free annual produce of his trust estate fell to be divided among his three children in the proportion of three-eighths to each of his sons and two-eighths to his daughter, and the capital of the shares so liferented fall to be divided among the issue of the liferenters respectively. In the event of one child dying without leaving issue to take the share liferented by their parent, the share fell to be divided into two equal parts—the income of one of such parts to be paid to each of the other two children, and the fee thereof to his or her issue. In the event of two children dying before or after the testator without leaving issue, the whole residue was to be paid to the survivor in liferent and his issue in fee.

"The 12th article deals with the event of the survivor of the children dying without leaving issue. It is in the following terms:—'Should the survivor of my children die without leaving issue who survive the term of payment of their shares (but survived by issue of my other children or one of them) my trustees shall pay and convey one-half of the fee of the portion of my estate liferented by such survivor to and among the issue of my other child or children in such way and manner and in such proportions and subject to such conditions as such survivor may have directed by any deed or writing under his or her hand, and failing such writing, then equally between the families of my other children (the share of each family in such case being divided equally among the members thereof), or if one only shall leave issue, then to such issue equally among them: And with regard to the other half of the fee liferented by the survivor, I hereby declare that he or she shall have full power by any *mortis causa* deed or writing by him or her to dispose of the same, and direct the succession thereto in favour either of religious or charitable institutions, one or more, conducted according to Protestant principles, or of any person or persons whom such survivor may appoint, or partly in favour of such institution or institutions and partly in favour of such person or persons, all in such terms and subject to such conditions and directions as such survivor may think proper; but should the survivor not exercise the foregoing power of disposal, then the said one-half of the fee, or any portion thereof not disposed in virtue of the foregoing power, shall be divided equally among the issue of my other children by families.'

"On 26th November 1894, while his brother and sister were still alive, Walter *secundus*, the eventual survivor, executed a deed of directions, which on the narrative of the 12th article of his father's settlement proceeded as follows:—'And whereas I have resolved, that should I be the survivor of my father's children, and the event contemplated in the twelfth purpose of the said trust-disposition and settlement should occur, to exercise the power thereby conferred upon me in manner and to the effect underwritten, Therefore I hereby direct the trustees acting for the time under the said trust-disposition and settlement, in the events mentioned in said purpose, (*first*) to allocate and pay the one-half of the fee of my said father's means and estate liferented by me to my niece Jessie Bannerman, daughter of my brother Robert Bannerman, and (*second*) to pay to my wife Mrs Mary Ramsay or Bannerman, absolutely, in the event of her surviving me, the other half of the fee of my said father's means and estate liferented by me.'

"The validity of this deed of directions has been challenged on the ground that it was executed by Walter *secundus* prematurely, at a date when in fact he was not the 'survivor' of the children of Walter *primus*, both his sister and his brother Robert (senior) being then alive. It is also maintained that the power of disposal conferred upon the testator's last surviving child with regard to the second half of the fee liferented by him is void from uncertainty and that no valid disposal could proceed upon it.

"A subsidiary question is raised as to the meaning of the words 'estate liferented by such survivor,' whether it means only the estate originally liferented by him, or the estate actually liferented by him at the date of his death.

"In my opinion the deed of directions by Walter *secundus* is valid and effective as

a deed exercising the powers conferred upon the last survivor of the children of Walter *primus*.

"In the first place, as to the nature of the deed or writing. It deals with both the 'one' half and the 'other' half of the estate liferented by Walter *secundus*. It proceeds on a narrative of the 12th article of the trust-disposition and settlement of Walter *primus*, and *inter alia* recites the power to deal with the 'other' half by *mortis causa* deed or writing. It then purports to give effect to the power so conferred, in the event of the writer being the survivor of his father's children and of the occurrence of the events contemplated by the 12th article. One of the events so contemplated is the death of the survivor of the children without leaving issue. The deed further contains provisions with reference to the 14th article of his father's settlement, which are of a distinctly testamentary nature. There was nothing to prevent the writer at any time during his life revoking the deed in whole or in part.

"In my judgment, therefore, the deed of directions is a *mortis causa* deed or writing, intended to speak as from the date of the death of Walter *secundus*, when his liferent interest in his portion of the trust estate came to an end.

"Now Walter *secundus* was, in fact, the actual survivor of his father's children, and he died without leaving issue, and the deed of directions is under his hand. It seems to me that the whole requirements of the 12th article are satisfied. . . . . . .

"It is further said that the power is void because of the word 'religious' in describing the institutions which are possible objects of the power. Now it cannot be disputed that if the power given had been to dispose of the estate 'in favour of religious or charitable institutions' it could not be sustained as a valid power — *Grimond or Macintyre* v. *Grimond's Trustees*, 7 F. (H.L.) 90, *Shaw's Trustees*, 8 F. 52 — there being no suggestion of local or other limitation—*M'Phee's Trustees*, 1912 S.C. 75.

"But the power is not so expressed. There is, in the first place, a double alternative so to speak. The donee is given a power to dispose in favour 'either' of institutions, religious or charitable, 'or' of persons. Now in none of the cases which were cited was the power under consideration similarly expressed. There was only one class of objects, 'institutions,' 'purposes,' 'societies,' and so on, and it was argued that in the present instance it was not necessary for the donee to consider, much less attempt to give effect to, the alleged invalid alternative of the power at all—that he was entitled to limit the disposal of the estate to persons only. I think he might, but at the same time he was not bound so to do; and exactly the same thing might be said with reference to the institutions themselves. He might distribute the estate only among charitable institutions, ignoring the religious. But it is just because the word 'or' falls to be read disjunctively, and the donee is therefore given the power to apply the fund to any of the favoured objects, that the law holds such a power to be void when among the possible objects is found one so indefinitely described as not to be an ascertainable entity. Accordingly I cannot hold that the particular form of expression in the present case grounds any solid distinction between it and the powers in the other cases to which I have referred.

"But then, in the second place, the general words 'religious or charitable institutions' are followed by the limiting words, 'conducted according to Protestant principles.' Now in my opinion that is a sufficiently precise definition of religious institutions 'to enable men of common sense to carry out the expressed wishes of the testator'—*Weir* v. *Crum Brown*, 1908 S.C. (H.L.) 3, Lord Chancellor at p. 4. It does not appear to me that it should prove more difficult to ascertain institutions conducted according to Protestant principles than 'foreign missions'—*Allan's Executor* v. *Allan*, 1908 S.C. 807. It is to be noted that in *Grimond's* case, 6 F. 285, Lord Low thought that if the word 'religious' had fallen to be construed as referring to the Christian religion, a term of wider signification than Protestant, it would have been sufficiently precise.

"Accordingly I am prepared to hold that the deed of directions is a valid execution of the power of disposal with regard to both halves of the estate liferented by Walter *secundus*. . . .

"In my judgment, therefore, the administration of the trustees of Walter *primus* has been in strict accordance with the rights of parties. If that be so, then it is not necessary for me to deal with the questions raised with regard to the discharges granted by Robert Bannerman junior and by Walter *tertius*, but I may say that, in my opinion, looking to the conflicting statements as to the circumstances in which these discharges were obtained and granted, these questions could hardly be disposed of without some inquiry into the facts.

"I shall sustain the claims stated for the trustees of Walter *primus* and Mrs Brodie, and for Mrs Mary Ramsay or Bannerman, and rank and prefer them accordingly, and repel the claims stated for the other parties."

Robert Bannerman junior, the real raiser, reclaimed and argued—(1) The provision of the settlement in question was void from uncertainty. It contained three alternative directions, and if one of these was void the others fell with it. The direction in favour of "religious or charitable institutions" was bad—*Shaw's Trustees* v. *Esson's Trustees*, November 2, 1905, 8 F. 52, 43 S.L.R. 21; *Macintyre* v. *Grimond's Trustees*, January 15, 1904, 6 F. 285, Lord Moncreiff at 291, 41 S.L.R. 225; March 6, 1905, 7 F. (H.L.) 90, 42 S.L.R. 466; *Blair* v. *Duncan*, December 17, 1901, 4 F. (H.L.) 1, Lord Davey at 2, 39 S.L.R. 212 (*sub voce Young's Trustees*). Though a charitable institution had been sufficiently defined—*Dundas* v. *Dundas*, January 27, 1837, 15 S. 427—it was impossible to say what a religious institution was. The qualification "conducted according to Protestant principles" did not sufficiently define the meaning. Such institutions were not necessarily under the Protestant Church. They

might be of any religion. There was no definition of Protestant principles. The Crown might be said to be a religious institution on a Protestant basis—Imperial Dictionary *sub voce* Protestant; Encyclopædia Britannica, *sub voce* Protestant. In support of their argument counsel also referred to *Brown's Trustees* v. *M'Intosh*, May 26, 1905, 13 S.L.T. 72; *M'Conochie's Trustees* v. *M'Conochie*, 1909, S.C. 1046, 46 S.L.R. 707; *Allan's Executor* v. *Allan*, 1908 S.C. 807, Lord Kinnear at 814, 45 S.L.R. 579; *Smellie's Trustees* v. *Glasgow Royal Infirmary*, October 31, 1905, 13 S.L.T. 450; *M'Phee's Trustees* v. *M'Phee*, 1912 S.C. 75, Lord Dundas at 77, 49 S.L.R. 33; and *distinguished M'Lean* v. *Henderson's Trustees*, February 24, 1880, 7 R. 601, Lord Moncreiff at 611, 17 S.L.R. 457; *Cleland's Trustees* v. *Cleland*, 1907 S.C. 591, 44 S.L.R. 412; *Hay's Trustees* v. *Baillie*, 1908 S.C. 1224, 45 S.L.R. 908; *Macduff* v. *Spence s Trustees*, 1909 S.C. 178, 46 S.L.R. 135; *Cobb* v. *Cobb's Trustees*, March 9, 1894, 21 R. 638, 31 S.L.R. 506; *Weir* v. *Crum Brown*, 1908 S.C. (H.L.) 3, Lord Loreburn, L.C., at 4, 45 S.L.R. 335; *M'Phee's Trustees* v. *M'Phee* (*cit. sup.*); *Allan's Executor* v. *Allan* (*cit. sup.*). (2) The expenses should come out of the estate, since the testator had caused the difficulty which gave rise to the present action—*Hill, &c.* v. *Burns*, April 14, 1826, 2 W. & S. 80, Lord Gifford at 92; *Magistrates of Dundee* v. *Morris, &c.*, March 25, 1858, 3 Macq. 134, Lord Cranworth at 177.

Argued for Mrs Mary Ramsay or Bannerman (claimant and respondent)—(1) The term "religious" need not necessarily be treated as of uncertain meaning, but in a suitable context as here it might stand—*M'Phee's Trusteees* v. *M'Phee* (*cit. sup.*); *Macintyre* v. *Grimond's Trustees* (*cit. sup.*) There were in the settlement not three alternative directions but two only—(*a*) in favour of institutions (*b*) of selected persons. The "or" between "religious" and "charitable" was not really disjunctive. On this view the intention of the testator was perfectly clear. Even were it held that there were three alternatives, the nature of the religious institutions to be benefited was clearly defined. In *Shaw's Trustees* v. *Esson's Trustees* (*cit. sup.*), Lord Stormonth Darling at 54, the directions given to the trustees had been abnormally wide, whereas here the direction in favour of "religious or charitable institutions" was sufficiently precise to be given effect—*Crichton* v. *Grierson*, July 25, 1828, 3 W. & S. 329, Lord Lyndhurst, L.C., at 338. Even, however, were that direction held void from uncertainty, the alternative direction should be given effect to, as it conferred a beneficial right on the donee. Taking the directions as a whole they conferred a beneficial right on the donee to bestow the fee on anyone he pleased. The case of *Allan's Executor* v. *Allan* (*cit. sup.*) founded on by the reclaimer being concerned with the powers of trustees, not of liferenters, did not here apply. (2) On the question of expenses the plea of bar was still open. The present was not a suitable case for the application of the rule of *Hill, &c.* v. *Burns* (*cit. sup.*) and *Magistrates of Dundee* v. *Morris, &c.* (*cit. sup.*)

Argued for Walter Bannerman's trustees and Mrs Jessie Bannerman or Brodie, respondents—The Lord Ordinary had reached a right conclusion on the question of expenses. The expenses should not come out of the fund *in medio*, since the action was really one against certain of the beneficiaries in the trust estate, and was brought, not to aid the trustees in the administration of the trust, but to upset what they had already done in the discharge of their duties.

At advising—

LORD PRESIDENT—I think the Lord Ordinary has taken a right view of the clause of the late Mr Walter Bannerman's settlement which gives rise to the only question discussed before us. His Lordship's finding that the testator in effect gave to the survivor of his children the liferent of a portion of his estate, with a power to dispose of the fee at his death, was not impugned before us, and therefore I take for granted that Walter Bannerman junior was empowered by his father's settlement to dispose by way of *mortis causa* deed of one-half of the fee liferented by him in favour either of religious or charitable institutions, one or more, conducted according to Protestant principles, or of any person or persons whom the survivor might appoint, or partly in favour of such institution or institutions and partly in favour of such person or persons, all in such terms and subject to such conditions and directions as the survivor (Walter Bannerman junior in this case) might think proper.

Walter Bannerman junior exercised the power by bequeathing half of the fee to his wife by *mortis causa* deed. He died in 1903, and his widow has, I understand, since enjoyed the money. It is now said that the power conferred on him by his father's settlement was valueless, because it was to be exercised in favour of objects which were so vague and uncertain that no executor of common sense could make a selection among them. And it is common ground that if the expression "religious or charitable institutions" had stood alone the clause would have been void on the ground of uncertainty. But it is argued that the addition of the words "conducted according to Protestant principles" makes the clause sufficiently definite to salve it. That is the Lord Ordinary's view, and it is my view, for it appears to me that it gives a description of institutions, numerous no doubt, but sufficiently precise and definite to enable an executor to make a selection from among them. In other words it satisfies the familiar rule that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest. It would be idle at this time of day to review all the cases on this branch of the law and once more to examine and dissect the various tests which have from time to time been suggested and applied. I for my part prefer as the best, as it is the latest, the test suggested by Lord Kinnear in the

case of *Allan's Executor* v. *Allan* (1908 S.C. 807), where he says—"The question to be put in each particular case is whether the description of the class to be benefited is sufficiently exact to enable an executor of common sense to carry out the express views of the testator." This clause now before us I think satisfies that test, and with a variation appropriate to the circumstances I adopt Lord Kinnear's view when he says—"I cannot entertain any doubt that an executor of reasonable common sense and reasonable knowledge of such affairs as this will deals with will have no difficulty in determining whether any particular purpose is or is not a purpose falling within the class to be benefited by the bequest" to religious or charitable institutions conducted according to Protestant principles.

I am of opinion that the Lord Ordinary has reached a sound conclusion also on the question of expenses. If the question relative to the validity of the clause had been raised at the outset of the trust administration, in order to aid the trustees in their administration of the trust estate and to relieve them of difficulty and responsibility, I for my part would have held that the ordinary rule should apply, and that the expense should have been paid out of the estate, but this belated and unsuccessful attempt, not to aid but to upset the trust administration, it appears to me, must be followed by the usual consequences which are in store for an unsuccessful litigant. I am the more inclined to come to that conclusion in the present case because I observe that this is one only, and not the most important, of the questions submitted on the record to the judgment of the Court.

I am therefore for affirming the Lord Ordinary's interlocutor.

LORD JOHNSTON—Assuming that a power to appoint in favour of religious or charitable institutions conducted according to Protestant principles would be effectual, I think that it must be admitted that the Lord Ordinary did not have his attention directed to the difficulty occasioned by the introduction in the power in question of the alternative "or of any person or persons whom such survivor may appoint," and that consequently he has not dealt with it. Though counsel before us on being heard on the reclaiming note rather gave the point the go-by, I do not feel that we can shelter ourselves under the failure of parties interested properly to raise the question.

I confess, however, that this fact makes me approach the question with greater anxiety and with less confidence in my own judgment.

The law of Scotland does not admit of the delegation of the power of testing.

This proposition is subject to the limitation that, provided the class of object or of person is sufficiently defined, the testator may confer on his executors or trustees, or on a selected individual who becomes a trustee *ad hoc*, a power of appointment.

It is merely a rider upon this limitation that a power to appoint to charitable purposes, however generally stated, is sustained on the consideration that the appropriation to charity is constructively a sufficient definition of the class of object.

Such powers are fiduciary. But a testator may confer what, for want of more accurate definition, may be termed a beneficial power to dispose at will. I am not aware of any case where such a power has come under construction by the Court, where the donee of the power has not been liferenter of the fund, unless the case of *M'Lean* v. *Henderson's Trustees*, 7 R. 601, in one aspect of it be such a case. But it goes without saying that to give a person power of disposal, either of a fund immediately emerging or after a liferent or other limited interest, to another, is simply to give that person the absolute fee. Equally would it be so were the gift to take the form of a bequest of a sum in liferent with power of disposal of the fee, no trust being interposed.

But where the gift takes the form of a bequest of a liferent of a fund in the hands of trustees with a power to dispose of the fee at will, but only *mortis causa*—more briefly stated, with a power to test—the bequest is also a beneficial power. It is not a mere delegation of the testator's power to test, notwithstanding that it leaves the donee of the power to select the beneficiary in fee of the testator's estate or of a part of it. The power is itself the testator's bequest to the donee of the power, and leaves the donee free to dispose by will of the fund as if it was his own, and even to come under obligation to bequeath for a consideration paid him *inter vivos*.

In the case of such powers to test various illustrative questions have arisen—as, for instance, Are they well exercised by a general settlement? What is the effect of bankruptcy of the donee of the power? May the donee of the power appoint to his creditors, and can he be required to do so? &c.

The present case raised the novel question whether a power which *prima facie* is of the nature of a trust can be effectually combined alternatively with a power which, had it stood alone, might have been interpreted as beneficial over the same fund, the choice of the alternative being left to the donee of the power, and what is the effect of their being so combined? The testator has given his son Walter Bannerman *secundus* a liferent of a portion of his residue, and in the circumstances which have emerged power by *mortis causa* deed or writing to dispose of and direct the succession to one-half of the fee thereof "in favour either (*a*) of religious or charitable institutions, one or more, conducted according to Protestant principles, or (*b*) of any person or persons whom" he, Walter Bannerman *secundus*, "may appoint, or (*c*) partly in favour of such institution or institutions, and partly in favour of such person or persons."

Now (*a*) the power to appoint to religious or charitable institutions is in its nature a trust power. I cannot conceive of it as a beneficial power which the donee could exercise in any way for his own benefit, as by taking a consideration from a charitable institution in respect of the exercise of it,

Had it stood alone it would, as held by the Lord Ordinary, have been valid and effectual, by reason that the general and indefinite term "religious institution" is qualified by the limitation "conducted according to Protestant principles."

But (*b*) the power to test in favour of any person or persons whom the donee of the power may select, had it stood alone, might have been regarded as a beneficial power. If not so intended it must be held void, because it does not attempt to define any class of persons and would be merely a delegation of the power to test.

It appears to me that the donee of the power and his appointee are by the alternatives introduced into the power placed in this dilemma—if the testator has conferred on his son a trust power, and alternatively a beneficial power, in his option, in relation to the same fund, he has invalidated both, because he has truly delegated to his son the power to determine whether this portion of his estate is to go to religious or charitable objects, or is to be dealt with testamentarily by himself as if it was his own, and that is, I think, substantially to delegate to his son his power to test. I do not, however, stand on this view, which I know is controverted by my learned brother Lord Skerrington, for there is the other limb of what I consider a dilemma, which in itself is, I think, sufficient in support of my opinion, for if, on the other hand, the testator has committed to his surviving son a power which in both its alternatives is fiduciary, then it is void for uncertainty, because in one of the alternatives he has not attempted to define the class to be benefited.

What, then, was the testator's intention? There is, I admit, room for diversity of opinion. But on the best consideration I can give it, I think that the power is one power, and in both its alternatives must be held to be fiduciary.

1st. It must be noted that in the 12th, 13th, and 14th heads of his settlement the testator creates no less than four powers, all differently phrased and of different effect, in favour of his surviving child. In the first half of the 12th head there is a power to apportion among issue of predeceasing children. In the 13th head there is a power to appoint a limited liferent to his widow. In the 14th head there is a power to test, of the most clearly beneficial kind, given on the assumption that there are no issue of predeceasing children. And in the latter part of the 12th head there is this nondescript power with which we have to deal. In this case it is assumed that there are issue of predeceasing children, and there is a destination-over to them. They are only to be cut out on the survivor exercising the power.

2nd. The power itself is specially worded. It is "to dispose of the same and direct the succession thereto in favour of." I do not think that the testator would have used these latter words if he had not conceived of the donee of the power as exercising for him his power to select and to test. And the phrase has the greater force when found in collocation with the destination-over.

But 3rd, independently of these special indications of intentions there is this still more material consideration that both alternatives are given on precisely the same footing. I cannot read them as two concurrent powers but as one power, viz., to appoint to charitable or religious institutions, or to such persons as the donee may select.

If that be the case, the power does not meet the requirement of *Crichton's* case (3 W. & S. 329) by defining the class within which the appointment is to be made. The case is *a fortiori* of *Blair's* case (4 F. (H L.) 1) and *Grimond's* case (7 F. (H.L.) 90.

And 4th. This is made, I think, more clear when one looks at (*c*), the third alternative power, viz., to dispose of the fund partly in favour of religious or charitable objects and partly in favour of the donee's own nominees.

I have therefore, though in the circumstances as I have already said not without hesitation, come to the conclusion that had the Lord Ordinary exhausted the matter submitted to his determination he must have come to a different conclusion.

I entirely agree in the judgment which your Lordship proposes on the subject of expenses, seeing what the interlocutor of the Court will be, although I differ from the judgment on the merits.

Lord Skerrington—Much learning has been devoted both by the older and by the more recent Scottish lawyers to the subject of faculties or powers in virtue of which a person who has reserved the power or in whose favour it has been constituted is enabled to dispose effectively of property which does not belong to him. Such a person may, for shortness, though not always accurately, be described as the donee of a power. I have not, however, come upon any discussion of a distinction between two classes of powers which is of considerable practical importance and which is vital in the present case. A power of disposal may be a proprietary right which entitles the donee to convey the property to himself or to a purchaser if the power can be exercised *inter vivos*, or which entitles him to bequeath the property to his own testamentary executor, or to any person who is willing to pay a price in return for a prospective legacy if the power must be exercised by a revocable and *mortis causa* writing. On the other hand, a power of disposal may be of the nature of a trust in the person of the donee. Sometimes, again, a power partakes of both characters, as in the case of the power of sale which a borrower confers upon the lender in a bond and disposition in security, whereby the lender acting primarily but not exclusively in his own interests is entitled to sell the subjects, and though himself only an incumbrancer is enabled to infeft a purchaser in the property of the subjects. The typical instance of a purely proprietary power is a general power of dis-

posal to be exercised either *inter vivos* or *mortis causa*, as the case may be. In the case of *Hyslop* v. *Marshall's Trustees*, (1843) 12 S. 413, the Judges described a general testamentary power of disposal as making the subject of it virtually though not technically the property of the donee of the power. On the other hand, the case of *Murray* v. *Fleming and Others*, (1729) M. 4075, is an early example of a power which the donee could not have validly exercised for her own pecuniary advantage, viz., a power to a liferentrix to nominate as the fiars such of her husband's blood relations as she should think most fit. This power was held to be valid, and the decision was cited as a precedent in the leading case of *Crichton* v. *Grierson*, (1828) 3 W. & S. 329. A recent example of the same kind of power is to be found in the case of *Allan's Executor* v. *Allan*, 1908 S.C. 807, where the Court interpreted a bequest "for the benefit of foreign missions" as impliedly conferring a power of selection upon the executor. Lord Kinnear (p. 815) said that the executor must "exercise his discretion as a trust committed to him, and not merely according to his own favour for one or other association for prosecuting foreign missions." A fiduciary power cannot be delegated, whereas a person who has a general and proprietary power of disposal may direct that the fund shall be applied to such charitable purposes as his own testamentary trustees may select —*M'Lean* v. *Henderson's Trustees*, (1880) 7 R. 601, *per* Lord Justice-Clerk Moncreiff at pp. 611, 612. For the purposes of the present case the most important distinction between the two classes of powers is that a proprietary power cannot be too general, whereas a fiduciary power is invalid unless the description of the class to be benefited is "sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator" or other creator of the power—*Weir* v. *Crum Brown*, 1908 S.C. (H.L.) 3, *per* Lord Chancellor (Loreburn) at p. 4. Thus a power conferred upon trustees to dispose of the truster's estate "in such manner as they think proper" is ineffectual either to give to the trustees a proprietary right to the property or to impose upon them a valid trust with regard to it—*Sutherland's Trustees* v. *Sutherland's Trustee*, (1893) 20 R. 925, 30 S.L.R. 809; *Anderson* v. *Smoke*, (1898) 25 R. 493, 35 S.L.R. 396.

Where a power of disposal has been conferred upon a person who is expressly described as a trustee, as happened in the two cases last cited, it is easy to come to the conclusion that the power is fiduciary and not proprietary. On the other hand, where the donee is a liferenter or other person who is not expressly described as a trustee the power is *prima facie* proprietary, but the nature of the power may show that it is fiduciary. I see no reason in principle why the same person, *e.g.*, a liferenter, should not have conferred on him both a fiduciary and also a proprietary power of disposal over the same property, *e.g.*, a fiduciary power to dispose of it in favour of such persons as he might select as the most deserving from a certain limited class, and also a patrimonial power to dispose of it in favour of any person outside of that class whom he might desire to favour from motives either of self-interest or of benevolence. As a matter of intention and construction such a combination of powers may be unlikely, but I cannot agree with the opinion of my brother Lord Johnston that it would amount to a delegation of his power to test on the part of the donor of the power. In the only case prior to the present one where this question might have been judicially considered the Court seem to have construed the whole power as proprietary—*Watt or Whyte* v. *Tawse*, (1829) 8 S. 107. In that case a widow had been empowered by her husband's will to dispose after her death of a sum of £160 either to or among her children or her brothers and sisters or such other persons as she should direct. The widow conveyed to her sister *mortis causa* her whole moveable property, and at the same time expressly assigned to her the said sum of £160, but under burden of any debts which she (the widow) might owe at the time of her death. It was decided that the succession was burdened with payment of the widow's debts. It was not argued, however, that the appointment being inseparable from the condition was a fraud on the power and therefore invalid.

The question which we have to decide is whether the *mortis causa* power of disposal which the testator conferred upon the survivor of his children with regard to the "other half of the fee liferented by the survivor" was wholly fiduciary or wholly proprietary, or was in part the one and in part the other. In the first case the power as a whole would be void from uncertainty, as the testator did not specify the class of "persons" whom he desired to benefit, and it would be immaterial whether the specification so far as it related to "institutions" was or was not so definite that the power would have been valid if it had limited the liferenter to disposing of the capital in favour of such institutions only. On the other hand, if the power is construed as one which is wholly proprietary, no question can arise as to the validity of its exercise by the liferenter in favour of his widow. The result would be the same if we regard the power as fiduciary so far as regards the selection of religious or charitable institutions, and as proprietary so far as regards the selection of "persons" to be benefited. Even if the class of institutions which the testator desired to benefit had been left uncertain, the proprietary power to dispose of the fund in favour of "persons" would not be invalidated because an invalid fiduciary power was superadded to it.

The argument in favour of the view that the power as a whole is fiduciary is as follows:—*Prima facie* a power to select religious or charitable institutions is fiduciary, and implies that it shall be exercised with an unselfish, as contrasted with a selfish, discretion. On the principle *noscitur a sociis* the power to select persons was of the same category. The word "persons" as used by the testator was in contrast to "institutions" and meant "individuals." This re-

striction of the objects of the power supports the view that the power was fiduciary rather than patrimonial. The objection to this construction of the clause is that it makes the whole power of disposal a nullity, and thus defeats the plain intention of the testator, which was that the liferenter should effectually possess the power which the clause purports to confer upon him. Nothing short of necessary implication would entitle one to read into a clause words which the testator has not used, and which would make it absolutely void and ineffectual. An alternative view is that the power was wholly proprietary, and that the reference to religious or charitable institutions conducted according to Protestant principles was merely suggestive. If this view is the right one it would follow that the liferenter might, following the precedent of *Whyte's* case, have disposed of the fund *mortis causa* in favour of a particular charitable institution, but conditionally on a certain payment being made by the institution either to himself during his lifetime or after his death to his testamentary executor. The right course, in my opinion, is to adopt a construction which gives full and literal effect to every word of the clause, and which is not open to the objection that it either nullifies the whole clause or converts a fiduciary into a proprietary power. According to this interpretation the testator conferred upon the liferenter two different and distinct powers, viz., a fiduciary power to select religious or charitable institutions, and a limited proprietary power to dispose of the fund or any part of it *mortis causa* among individuals as distinguished from institutions. The latter power has in the present case been validly and effectually exercised in favour of the widow of the liferenter.

In the view which I have taken of the clause as a whole it is unnecessary to decide whether the reference to Protestant principles differentiates the present case from that of *Grimond* v. *Grimond's Trustees*, (1905) 9 F. (H.L.) 90, so far as regards the direction to dispose of the fund in favour of religious or charitable institutions. My present impression is that the Lord Ordinary has come to a right conclusion as to this question. Though I have dealt with the case somewhat differently from the way in which the Lord Ordinary dealt with it, I am of opinion that his interlocutor should be adhered to.

As regards the question of expenses I agree with what was said by your Lordship in the chair.

LORD MACKENZIE was not present.

The Court pronounced this interlocutor—

"Adhere to the said interlocutor: Refuse the reclaiming note and decern: Find the reclaimer liable to the respondents in expenses since the date of said interlocutor, and remit," &c.

Counsel for Robert Bannerman junior (Real Raiser and Reclaimer)—Wilson, K.C.—Maclaren. Agent—A. W. Gordon, Solicitor.

Counsel for Walter Bannerman's Trustees and Mrs Jessie Bannerman or Brodie (Claimants and Respondents)—Anderson, K.C.—Lippe. Agents — Macpherson & Mackay, S.S.C.

Counsel for Mrs Mary Ramsay or Bannerman (Claimant and Respondent)—Hon. Wm. Watson, K.C.—C. H. Brown. Agents—J. W. & J. Mackenzie, W.S.

Tuesday, January 26.

FIRST DIVISION.

[Lord Dewar, Ordinary.

CLYDEBANK AND DISTRICT WATER TRUSTEES *v.* FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Cautioner—Contract—Construction—Condition-Precedent—Extinction of Guarantee of Contractors through Failure of Employers to Observe Condition to Give Notice to Cautioner of Non-Observance by Contractors of Stipulations of Contract.

A entered into a contract with B for laying pipes for a water supply, the contract providing in detail for different portions of the work being begun at specified dates and a certain amount being done weekly. In terms of the contract, B found security for the proper and timeous completion of the contract, C becoming surety for £5000. The bond of security provided that A should give notice to C of any non-observance by B of the stipulations of the contract which might involve a loss for which C would be responsible. B failed to perform the contract work at the times specified in the contract, but A did not give notice of the failure to C. B ultimately became unable to complete the contract work. A gave notice of this failure to C, and claimed payment of the amount in the bond of security. *Held* (*diss.* Lord President) that B's failure to execute the work timeously was a non-observance of the conditions of the contract of which C was entitled to notice whether a claim for loss therefor was to be made or not, that the obligation to give notice of any non-observance of the terms of the contract was a condition-precedent of the contract of insurance, that the condition-precedent had therefore not been fulfilled, and the surety *assoilzied.*

On 23rd February 1912 the Clydebank and District Water Trustees, *pursuers*, brought an action against the Fidelity and Deposit Company of Maryland, *defenders*, concluding for payment of £5000, the sum guaranteed in a policy or contract bond of insurance by which the defenders had become sureties for the due and timeous completion by the Columbian Fireproofing Company, Limited, of an engineering contract made between them and the pursuers.

The defenders pleaded, *inter alia*—"(2) The pursuers having failed to fulfil the con-